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607 FOURTEENTH STREET, N.W. • WASHINGTON, D.C. 20005-2011
(202) 628-6600 • FACSIMILE (202) 434-1690

January 25, 1994

N. Bradley Litchfield, Esq.
Associate General Counsel for Policy
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

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FEDERAL ELECTION COMMISSION

Dear Mr. Litchfield:

Franklin National Bank ("the Bank") requests an advisory opinion under 2 U.S.C. § 437f, on the application of the "ordinary course" requirement for bank lending to the negotiation of charges for services rendered to borrowers which are political committees.

Factual Background

The Bank plans in the coming election cycles to make loans to qualified candidates for federal office and their committees in accordance with generally applicable banking laws and regulations and the requirements of the Federal Election Campaign Act (the "Act"). 2 U.S.C. §§ 431(8)(B) (vii); 11 C.F.R. §§ 100.7(b)(11), 100.8(b)(12). The Bank is considering in particular how to proceed with the negotiation of service fees and other costs customarily negotiated with borrowers establishing accounts with the Bank. Charges subject to negotiation include (but are not necessarily limited to) those for incoming and outgoing wire transfers; stop payment orders; daily account transfers; service charges on deposit accounts; legal fees for the review of loan documentation and closing services; and preparation of special bank statements to conform to customer dating requirements.

In the ordinary course of managing deposit relationships with customers, the Bank will agree to waive certain of these fees. On some occasions, the customers will request waiver; on others, the Bank will offer the waiver in order to attract new business or maintain an already established and successful customer relationship. The business judgment of bank loan officers guides the decisions made about which customers are offered waivers and the precise fees waived.

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Generally, in making their judgment, the loan officers will consider the size of the account -- the amount of cash generally on deposit -- and other factors (such as the history of the account with the Bank) which bear on the profitability of the customer relationship. The same considerations apply to all borrowers.

The Bank for this reason may have cause to consider a waiver from certain of these fees for political committee borrowers in coming cycles. The question presented in these circumstances is whether the Bank can provide a waiver of these costs without incurring liability for a "contribution" or "expenditure" in violation of Section 441b of the Act. The Bank has referred to the requirements of the Act and related regulations which suggest that so long as the terms offered to political borrowers are consistent with terms offered to non-political borrowers in similar circumstances, the Act's requirements are satisfied.

Relevant Law and Regulations

The Act specifically exempts from the definition of contribution or expenditure loans made in the "ordinary course" and in accordance with applicable banking law and regulations.¹ The Commission has treated the "loan" subject to the Act to include all aspects of the loan agreement. See, e.g., 11 C.F.R. § 100.7(b)(11)(i)(B)(4) (requiring that the "loan agreement" pledging future receipts in repayment include a separate and dedicated depository account). The agreement between the borrower and the Bank in these circumstances extends, of course, to all terms and conditions, including any additional fees charged to the borrower for loan or account services. Accordingly, the "ordinary course" requirement would appear to hold that the treatment of these costs --- their assumption by the political committee-borrower or any waiver by which the Bank assumes liability for them -- may lawfully follow market practice for commercial borrowers in similar circumstances.

¹ The treatment of fees proposed in this request would satisfy all such banking law and regulations and the only question raised in this opinion concerns their treatment under the Act.

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The Commission, moreover, has interpreted the "ordinary course" requirement to afford banks and borrowers maximum flexibility in structuring lending agreements. See Commission Explanation and Justification for the Final Rules, 56 Fed. Reg. 67120 (December 27, 1991) at pp. 67,119 - 67,121. Thus, it rejected a mandatory "set aside percentage" because

[it] would unnecessarily infringe on the ability of the Bank and the borrower to structure each loan to reflect the particular circumstances of that loan.

56 Fed. Reg. 67,119 (December 27, 1991).

The Commission has limited a bank's flexibility only where there was an apparent express congressional intention to impose the additional requirements reflected in subparagraphs (I) through (III) of § 431(8)(B)(vii).²

Discussion

These specific regulatory provisions follow the principle that corporate or commercial transactions with candidates and committees are permissible if they conform to the usual and normal commercial practices for the type of transaction and industry. See e.g. Advisory Opinion 1982-30, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5673 (May 14, 1992) (sale to candidate of coupon book providing discounts for use of particular restaurants); Advisory Opinion 1981-42, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5625 (October 13, 1981) (payment by candidate's consulting firm of disputed third party debt incurred in the campaign); Advisory Opinion 1979-36, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5421 (July 27, 1979) (extension of credit by direct mail firm for initial mailing on behalf of candidate); Advisory Opinion 1977-22, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5251 (May 27, 1977) (charge to candidate for rental of fundraising facility).

² These include, for example the requirements that the loan be "evidenced by a written instrument" and "subject to a due date or amortization schedule."

In all of these instances the candidate or committee and the person providing commercial services to the campaign achieve compliance with the Act when their transaction follows "ordinary course" practice -- that is, it is demonstrably consistent in all material respects with the treatment of non-political customers in similar circumstances. Several specific recurring examples illustrate the standard and its typical application. In Advisory Opinion 1977-68, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5284 (February 8, 1978), the Commission approved the engagement of a lobbyist then also running for office where it appeared that his was a "bona fide" employment relationship and that the compensation paid to the lobbyist was in consideration solely of lobbying services. But in other Advisory Opinions, see e.g. Advisory Opinion 1978-6, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5300 (March 23, 1978) and Advisory Opinion 1980-115, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5559 (October 14, 1980), the Commission required adjustment in the terms and conditions of employment where the time devoted by the employee to candidacy would necessarily reduce the amount of time committed to regular employment activities.³

The Commission has specifically authorized commercial engagements in instances where a portion of a fee has been waived or discounted. In Advisory Opinion 1985-28, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5828 (November 4, 1985), the Commission authorized a candidate to accept a rebate of some portion of a fee payable for professional fundraising services where the private firm providing the services offered that same rebate to all customers. Similarly, in Advisory Opinion

³ Similarly, the Commission has insisted that candidates observe a relatively clear distinction between commercial transactions generally necessary to the conduct of their business and other arrangements which, however commercial in character, invite or promote direct corporate support for their fundraising or other political activities in violation of Section 441b. See e.g., Advisory Opinion 1979-17, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5416 (July 16, 1979) (affinity credit card arrangement may be beneficial to card-issuing bank, but results in impermissible corporate support for partisan political communication). See also Advisory Opinion 1982-16, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5652 (April 5, 1982) (publishers book party promotes book, but may not also serve as a candidate fundraising event at which the admission fee charged would be treated as a "contribution").

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January 25, 1994
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1988-22, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5861 (July 24, 1986), the Commission authorized political committees to accept a discount offered on rates paid for television time on the understanding that the station was providing the discount to all advertising customers on the same terms and conditions.

Conclusion

For these reasons, waiver of certain fees to political committee borrowers for the same business reasons which control such waivers for nonpolitical bank customers in similar circumstances, would appear to satisfy the "ordinary course" requirement of the Act and related regulations. The Bank respectfully requests an Advisory Opinion from the Commission which definitively addresses the issue.

Respectfully submitted,



Robert F. Bauer
Counsel to Franklin National
Bank

RFB:smb



FEDERAL ELECTION COMMISSION

WASHINGTON, DC 20003

February 4, 1994

Robert F. Bauer
Perkins Coie
607 14th Street NW
Washington, DC 20005-2011

Dear Mr. Bauer:

This responds to your letter dated January 25, 1994, on behalf of Franklin National Bank ("Franklin") which requests an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the waiver of bank service charges by Franklin when it makes loans to political committees.

Your inquiry explains that Franklin expects to make loans to Federal candidates and their committees in future election cycles which will comply with the Act and Commission regulations. Franklin also proposes to negotiate with these borrowers for the possible waiver of various service fees and other costs "customarily negotiated with borrowers establishing accounts with" Franklin. You list such services as including wire transfers, stop payment orders, daily account transfers, deposit account services, legal review fees for loan documents and closings, preparation of special bank statements.

You also state that Franklin may, in the ordinary course of its relationships with its customers, agree to waive "certain of these fees" either at the customer's request or by making its own offer to do so. Such an offer would be made "in order to attract new business or maintain an already established and successful relationship." You further state that the "business judgment of bank loan officers guides the decisions made about which customers are offered waivers and the precise fees waived." The officer in this context considers the amount generally on deposit in the account and other factors such as the account history. These factors, you indicate, "bear on the profitability of the customer relationship" and are the same considerations that apply to all borrowers.

You then pose the issue of whether Franklin's waiver of certain bank service fees for political committee borrowers may be provided without resulting in a "contribution" in violation of 2 U.S.C. §441b.

The Act authorizes the Commission to issue an advisory opinion in response to a "complete written request" from any person with respect to a specific transaction or activity by the requesting person. 2 U.S.C. §437f(a). Commission regulations explain that such a request "shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made." 11 CFR 112.1(c).

Your inquiry at this time does not sufficiently describe the conditions and circumstances that are anticipated with respect to future loans to political committees and the related service fee negotiations in connection with establishing Franklin accounts with these borrowers. Therefore, you are requested to provide additional facts and clarification, as well as documentation, in response to the following questions.

1) Please provide any documentation (such as a service fee schedule or chart) that Franklin uses to give written notice of all charges related to each bank service which is offered to each class of bank customer. With reference to each type of service that will be offered or available to political committee customers, describe in detail Franklin's specific fee waiver proposals for political committees.

2) Compare and contrast the proposed political committee waiver arrangements with those currently in effect for Franklin accounts owned or controlled by business entities and, if there are differences, by non-profit entities such as tax exempt organizations described in 26 U.S.C. §501(c)(3), (c)(4), (c)(5), and (c)(6). As to non-profit entities, explain the application of Franklin's fee waiver policy with respect to new accounts (open or active for less than a year) and accounts active for a year or more.

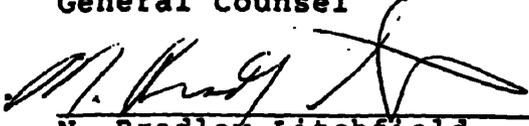
3) Does Franklin propose to waive service fees based on the amount, interest rate, amortization schedule or due date, of a political committee loan? Based on the borrowing committee's placement of all its operating accounts with Franklin? Only its primary operating account? Describe any other conditions that are subject to negotiation in the circumstances presented.

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Upon receiving your responses to the foregoing questions and request for documents, this office and the Commission will give further consideration to your inquiry as an advisory opinion request. If you have any questions about the advisory opinion process or this letter, please contact Mr. Litchfield.

Sincerely,

Lawrence M. Noble
General Counsel

BY: 

N. Bradley Litchfield
Associate General Counsel

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OFFICE OF GENERAL
COUNSEL

N. Bradley Litchfield, Esq.
Associate General Counsel for Policy
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

AOR 1994-10

Dear Mr. Litchfield:

Franklin National Bank ("the Bank") responds by this letter to your request for additional information dated February 4, 1994, in relation to the Request for an Advisory Opinion previously filed by the Bank on January 25, 1994.

1. Attached is the Bank's current fee schedules that are applied to various customers. All or nearly all of these fees could be applicable to a particular political committee customer, and all are potentially waiveable. Certain other expenses, particularly loan related expenses such as legal, documentation, appraisal and recordation expenses, are not part of the normal service charge schedules, but could also be waived where loans are involved. Waivers, such as in the examples below, typically cover 80-100% of the fees.

The Bank does not have a specific policy governing the waivers available for each fee or any "specific fee waiver proposals for political committees." Waivers are considered and granted on an account-by-account basis, governed solely by business judgments about the particular customer relationship and overall account profitability. For this purpose the Bank does not differentiate between political committees and any other types of customer.

The information provided in response to other questions generally describes the Bank's waiver procedures and the circumstances under which it may consider waiving charges.

2. The Bank does not differentiate waiver arrangements by customer group, whether political organizations, nonprofits, for-profit businesses, or individuals. In every case, the Bank attempts to estimate the overall profitability of the relationship, and then make a case-by-case determination based only upon the existing or expected profitability of the relationship. Generally no differentiation is drawn between a new account and one opened more than one year. For accounts open for more than one year, the Bank has the advantage of a historical calculation to more accurately determine profitability of an account. However, if a new account is substantial, the Bank is able to estimate profitability based upon the expected level of deposit balances versus the expected level of fees and charges likely to be incurred.
3. Waiver of various fees and service charges will not be based upon the terms of a loan. This is true for a political committee or any other customer. Waiver decisions are based upon the profitability of the deposit accounts. The Bank does not require that all of a customer's accounts be maintained with Franklin, but for an account to generate sufficient profitability to offset the costs involved, the balance needs to be at a significant level. While this often means that the Bank maintains all the customer's operating accounts or the primary operating account, this is not a requirement as long as the total balances maintained are sufficient.

It may be useful for your office and the Commission to have specific examples where waiver has been provided for other, non-political committee customers:

- Customer A - For one of our largest deposit relationships, a business corporation averaging about \$6.5 million in deposits of which about \$500,000 is non-interest bearing, the Bank waives most deposit related charges, including check printing charges.
- Customer B - For a nonprofit foundation with \$1.5 million in deposits, the Bank waives most deposit related charges.

N. Bradley Litchfield, Esq.

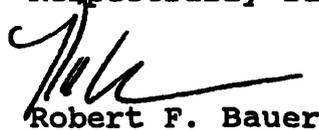
April 13, 1994

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- Customer C, a real estate leasing and brokerage firm, maintains about \$1.6 million in deposits and has received waivers of most deposit related charges. The Bank has also absorbed appraisal expenses on a loan to one of the principals.
- Customer D is one of the largest corporate depositors with about \$4.2 million in deposits, for whom the Bank has waived most deposit related charges.
- Customer E, a law firm, maintains about \$2.6 million in total deposits of which about \$1.0 million is non-interest bearing. The Bank has waived most deposit related charges.

In a number of other cases, when customers maintained less significant balances, the Bank has waived various charges. In a number of others the Bank absorbed appraisal and legal expenses on loans in consideration of the overall relationship.

Respectfully submitted,



Robert F. Bauer

FEE SCHEDULE

Non-Sufficient Funds Activity	
Overdraft, Check Loan Returned Check, NSF, or Returned Check Service Charge	
Each Item.....	\$25.00
Overdrawn Check Paid or Overdrawn Check Returned Fee	
Each Item.....	\$25.00
Telephone Transfer Fee.....	No Charge
Official Check Fee (Cashier's Checks).....	\$5.00
Traveler's Check Fee.....	1% of face value \$3.00 Minimum Charge
Money Order Fee.....	\$4.00
Collections Fee (Local).....	\$10.00
Foreign Check Collection Fee.....	\$10.00
Bond Coupon Envelope Handling Fee.....	\$10.00
Dormant Service Charge	
Checking Accounts - per month.....	\$3.50
Savings Accounts - per quarter.....	\$5.00
Automated Teller Machines	
MOST Service Charge.....	\$.50
Balance Inquiries.....	\$.50
ATM Card Replacement Fee.....	\$3.00
Night Deposit Bag Fee.....	\$20.00
Night Deposit Lost Key Fee.....	\$5.00
Balance Inquiries	
Touch-Tone Computer Inquiry (429-2213).....	No charge
On-Line Balance Inquiry Service Charge.....	\$1.00
Stop Payment Service Charge.....	\$20.00
Chargeback Service Charge or Returned Deposited Item Fee	
	\$3.50
Wire Transfers	
Outgoing Wire Fee.....	\$15.00
Incoming Wire Fee.....	\$3.00
Foreign Wire Fee.....	\$30.00
Courier Service Fee.....	As Appropriate
Certified Check Service Charge.....	\$10.00
Notary Service Fee.....	As Appropriate
Research Work Fee - per hour.....	\$30.00
Photocopy, Copy Of Check or Copy Of	
Statement Fee - per page.....	\$3.00
Special Statement Service Charge.....	\$5.00
Interim Statement Fee.....	\$5.00
Printout Of Account Update Fee.....	\$5.00
Attachments and Levies	
Garnishment Attachment Fee.....	\$75.00
Levy Attachment Fee.....	\$75.00
Safe Deposit Box Rental Fee	
Please contact us for sizes, rates, & availability.	
Safe Deposit Box Drilling.....	As Appropriate
Safe Deposit Lost Key Fee.....	As Appropriate
Security Transaction Fee.....	\$50.00
ACH Processing Fee.....	\$20.00
Personalized Check Printing Check Order Fee	
Please contact us for available styles & cost.	

DEPOSIT ACCOUNT CHARGES

TYPE OF ACCOUNT

Personal Checking

- Maintenance Fees if Average Daily Balance \$499.99 or less (Monthly).....\$10.00
- Maintenance Fees if Average Daily Balance more than \$499.99, but less than \$1,000.00 (Monthly)..... \$5.00
- If Average Daily Balance \$1,000.00 or more.....No Charge

Business Checking

- Maintenance Fees (Monthly).....\$10.00
- Per Paid Check..... \$.20

An earnings allowance is applied to the Average Daily Investable Balance and applied to accumulated activity charges. If activity charges are in excess of the earnings allowance, the account will be charged for the excess amount.

NOW Accounts

- Maintenance Fees if Average Daily Balance \$1,499.99 or less (Monthly).....\$12.00
- Maintenance Fees if Average Daily Balance more than \$1,499.99, but less than \$2,500.00 (Monthly)..... \$8.00
- If Average Daily Balance \$2,500.00 or more.....No Charge

Super NOW Accounts

- Maintenance Fees if Average Daily Balance below \$10,000.00 (Monthly)..... \$15.00
- If Average Daily Balance \$10,000.00 or more.....No Charge

Money Market Accounts

- Maintenance Fees if Average Daily Balance below \$5,000.00 (Monthly)..... \$15.00
- If Average Daily Balance \$5,000 or more.....No Charge

Savings Accounts

- Low Balance Service Charge if Daily Balance below \$100.00..... \$5.00
- Excess Activity Service Charge for each withdrawal in excess of 3 per calendar month..... \$3.00
- On-Line Balance Inquiry.....\$1.00